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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970

No. 999

EDWARD BROOKINS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

	Page
Report of Opinions Below	1
Statement of the Grounds on which Jurisdiction of this Court is Invoked	2
Question Presented for Review	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of The Case	5
Argument	6
Prayer	12
Certificate	12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Edward Brookins, by his attorney, S. Gunter Toney, presents this, his Petition for Writ of Certiorari:

REPORT OF OPINIONS BELOW.

The District entered judgment and imposed sentence but did not deliver an opinion.

The original opinion of the United States Court of Appeals he Fifth Circuit is reported, 423 F. 2d. 465, and is included in he Appendix herein (App. 12). The opinion of the United States Court of Appeals for the Fifth Circuit on the Petition for Rehearing has not been published in any official or unofficial report. That opinion is included in the Appendix herein (App. 27)

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks to have reviewed a Judgment of the United States Court of Appeals, Fifth Circuit, dated the 22nd. day of October, 1970, affirming the Judgment and Sentence of the United States District Court for the Middle District of Georgia, on appeal included in the Appendix herein (App. 27).

The statutory provision conferring on this Honorable Court jurisdiction to review the judgment of the United States Court of appeals, Fifth Circuit, is 62 Statutes 928, (June 25, 1948, Chapter 646).

QUESTION PRESENTED FOR REVIEW

The point relied on by the Petitioner for granting of the Writ of Certiorari is as follows:

THE COURTS FINDING OF PROBABLE CAUSE TO SUPPORT A WARRANTLESS SEARCH, SEIZURE AND ARREST VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, WHERE RELIANCE WAS PLACED UPON TITLE 26, SEC. 5601 (b) (2) (STATUTORY PRESUMPTION OF GUILT ARISING FROM PRESENCE AT UNLAWFUL DISTILLERY), WHERE THE PETITIONER WAS OBSERVED WALKING ON HIS FARM IN

AN OPEN FIELD AT A POINT AT LEAST 35 YARDS FROM A CONCEALED OPERATING DISTILLERY WHERE UPON A SEARCH REVEALED POSSESSION OF INCRIMINATING EVIDENCE RESULTING IN AN ARREST FOR THE OFFENCE OF POSSESSION OF AN UNREGISTERED DISTILLERY.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmative, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property; without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES AND RULES INVOLVED

1. 26 U.S.C.A. Sec. 5601 (a) (1) provides in pertinent parts:

"(a) OFFENSES - Any person who -

(1) Unregistered stills - has in his possession or custody, or under his control, any still or distillery apparatus set up which is not registered, as required by Section 5179 (a); or"

26 U.S.C.A. Sec. 5173 (a) provides:

"(a) General provisions - Every person intending to commence or to continue the business of a distiller, bonded warehouseman, or rectifier , . . shall file bond in the form prescribed by the Secretary or his delegate . . . ."

26 U.S.C.A. Sec 5602 provides:

Whenever any person engaged in or carrying on the business of a distiller defrauds, attempts to defraud, or engages in such business with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, he shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both. No discontinuance or nolle prosequi of any prosecution under this section shall be allowed without the permission in writing of the Attorney General.

26 U.S.C.A. Sec. 5601 (b) (2) provides in pertinent part:

(b) Presumptions.

(2) Failure or refusal of distiller or rectifier to give bond. Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or

carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT OF THE CASE

Petitioner and his co-defendant were indicted in Five Counts on charges of violating 26 USCA Sec. 5179 (a), 5601 (a), (possession of an unregistered distillery), 26 U.S.C.A. Secs. 5173, 5601 (a) (Carrying on the business of a distiller without bond), 26 U.S.C.A. Sec. 5602 (Carrying on business of distiller with intent to defraud), 26 U.S.C.A. Secs. 5180, 5681 (2) (worked in a distillery) and 26 U.S.C.A. Secs. 5205 (a) (2), 5604 (a) (possession of non-tax paid spirits).

The trial court took evidence on the Petitioner's Motion To Suppress evidence seized and incriminating statements and the same.

The Petitioner was then tried by the Court, after waiving trial by jury, found guilty on all five counts of the Indictment and sentenced to four years on Counts, One. Two, Three and Five, and twelve months on Count Four, each sentence to run concurrently

On appeal to the United States Court of Appeals, Fifth Circuit, the three judge panel reversed the judgment of conviction and discharged the Petitioner, finding that the facts known to the arresting officer at the time of Petitioner's arrest were insufficient to establish probable cause for a warrantless arrest and search. In a specially concurring opinion of Circuit Judge Rives, concurred in by Circuit Judge Morgan, found that the search of Petitioner preceded the arrest and could not serve as part of its justification. 423 F. 2d. 463, (App. 25).

Thereafter, the Appellate Court granted the Government's Petition for Rehearing en banc and requested supplemental briefs directed to the question of the validity of a confession,

obtained after proper warnings were given, but while the defendant is detained as the result of an unlawful arrest.

On October 21, 1970, the Appellate Court vacated its prior order granting rehearing en banc and remanded the cause to the original three judge panel.

On October 22, 1970, the panel rendered its decision on Petition For Rehearing. The majority opinion affirmed the judgement of conviction holding that Title 26, Section 5601 (b) (2) (statutory presumption of guilt arising from presence at an unlawful distillery) applied to the offense of carrying on the business of a distiller, and that although the arresting officer testified that it was his intention to arrest Petitioner for the offense of possession of a distiller and had actually conducted a search and seized evidence prior to the arrest that probable cause existed to justify the arrest for the offense of carrying on the business of a distiller.

Circuit Judge Coleman in his dissenting opinion held that "walking through a field with a paper sack, even if in the direction of the distillery, is not enough for me to hold that there was probable cause for an arrest for carrying on the business of a distiller. The point is that he was not at the still." (App. 36, Page 10 of opinion

ARGUMENT

THE COURTS FINDING OF PROBABLE CAUSE TO SUPPORT A WARRANTLESS SEARCH, SEIZURE AND ARREST VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS SECURED BY THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, WHERE RELIANCE WAS PLACED UPON TITLE 26, SEC. 5601 (b) (2) (STATUTORY PRESUMPTION OF GUILT ARISING FROM PRESENCE AT UNLAWFUL DISTILLERY), WHERE THE PETITIONER WAS OBSERVED WALKING ON HIS FARM IN AN OPEN FIELD AT A POINT AT LEAST 35 YARDS FROM A CONCEALED OPERATING DISTILL-

ERY WHEREUPON A SEARCH REVEALED POSSESSION OF INCRIMINATING EVIDENCE RESULTING IN AN ARREST FOR THE OFFENSE OF POSSESSION OF AN UNREGISTERED DISTILLERY.

Prior to non-jury trial the Petitioner filed his Motion To Suppress illegally seized evidence and statements. Testimony was taken thereon.

An agent of the Alcohol and Tobacco Tax Division testified that on January 30, 1968, he with other officers was looking in a wooded area for whiskey distilleries at a point approximately five hundred yards from the Petitioner's residence. A whiskey still was located; the co-defendant, Johnson, was observed working near the still; the still was in operation making noise; the odor of mash was noticable; that the still noise could be heard from 50 to 60 yards from the still.

The agent stationed himself approximately 25 yards from the still; observed petitioner walking toward him carrying two paper bags; that he approached Petitioner, searched the paper bags, discovered 25 corks and one severed jug spout. He then arrested the Petitioner for possession of a distillery.

The agent then took the Petitioner to the still where the co-defendant was arrested and alleged incriminating statements were made.

On cross-examination the agent testified that at the time of the arrest he did not have an arrest or seargh warrant; had not observed petitioner working or supplying the distillery; that he did not have confidential information connecting petitioner with the distillery.

The agent testified that he was dressed in green and was armed with a gun in view of petitioner at the time of the arrest.

The agent stated that petitioner was a "major violator" of the liquor laws, however admitted that at the time of the arrest he (witness) had only heard of an arrest of petitioner approximately two years prior thereto but had only

mately two years prior thereto but had not been informed of a conviction.

In its original opinion reversing the conviction and ordering Petitioner's discharge, Judge Coleman stated "mere presence at a still, or approaching near unto it on a well defined path cannot, prove the crime then, by the same reasoning, how can it raise the probability, in the absence of anything else, that one only approaching is in possession of the still?"

Circuit Judge Rives in a special concurring opinion, concurred in by Circuit Judge Morgan held that the seizure of the two paper sacks from Petitioner preceded his arrest.

The Court, in its decision on Petition For Rehearing held that it had been mistaken in its original opinion in treating the offense for which Petitioner was arrested as possession of an unregistered still rather than that of carrying on the business of a distiller prescribed by Title 26, Section 5601 (a) (4). It then applied the statutory presumption of guilt arising from presence at an unlawful still, Title 26, Sec. 5601 (b) (2), by stretching it to include those not present but intending to be present.

> "If Brookins had been arrested at the still itself his presence there would have justified his conviction for carrying on the business of a distiller. Under the existing circumstances, Brookins' direct approach to the still at a time when Nowicki expected the owner to appear and at a place about 25 yards from the still, then in full operation, amply furnished probable cause to believe that he intended to be present at the still site for some reason connected with the operation of the still. (Emphasis supplied).

Petitioner was walking in an open field on his own farm towards the wooded area where the officer was stationed. He had heard the noise coming from the still in the woods. His acts are consistent with a farmer inquiring into activity near his property.

The Officer had no knowledge, at the time of the arrest, that Petitioner had been convicted of a crime. (App. 7). However, the Court in its Opinion relies upon the fact that Petitioner had been so convicted in 1963 (App. 30). It is submitted that on the question of the existence of probable cause for an arrest

the facts known to the arresting officer at the time of the arrest are controlling and not what is developed subsequent thereto on trial. Henry v. United States, 361 U.S. 98, 102; Stacey v. Emery, 97 U.S. 642, 645.

The Courts reliance upon the arresting officer's testimony that he expected the owner of the still to appear is misplaced. There is no evidence in the record to support that bald conclusion. In fact Officer Nowicki testified that he had no confidential information connecting Petitioner to the still (R. 37, App. 6). It is apparent that the still in question was located only twenty minutes prior to the arrest. It is conceded that when the officer discovered the still, he took up a station in hope that others may arrive while the same was under surveillance. Anyone approaching the still would have been arrested.

Upon eliminating the factor of the Petitioner's reputation, as a major violator of the liquor law, unknown to the agent, and the officer's expectation that the owner of the still would appear, there remains the statutory presumption of presence at an unlawful distillery to support the finding of probable cause.

It is conceded that if Petitioner had in fact been discovered present at the distillery, the statutory presumption set out in Title 26, Sec. 5601 (b) (2) would apply and the arresting officer would have had probable cause to make the arrest for carrying on the business of a distiller, United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754.

The record establishes and the majority and dissenting opinions recognize that Petitioner was first observed at a point in excess of 25 yards from the concealed distillery.

In the case of Tot v. United States, 319 U.S. 463, 467, 63 S. Ct. 1241, 1245, this Court held:

> "... Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presume. If the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

This Court in the case of United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754 upheld the statutory presumption, Title 26, USCA, Sec. 5601 (b) (2) in a case where the defendant drove up to the site of a secluded still in an old Dodge Truck with darkened headlights, left the truck and walked to the still where he was confronted by revenue agents.

The Appellate Court in its majority opinion utilized the circumstantial evidence of Petitioner walking on his own farm in an open field at least 25 yards from an operating concealed distillery to draw inference number one, i.e. he intended to be present at the still; it then drew inference number two, i.e. that he intended to be present at the distillery for an unlawful purpose; this second inference is necessary to support the holding since only actual presence allows the presumption to arise or inference to be made that one actually present is deemed to play some part in furthering the operation of the still.

It is now recognized that experience proves some rational connection between one's presence at an unlawful still and the likelihood he had some part in furthering the operation.

There is no rational connection between the fact proved in this case, Petitioner's walking in an open field toward a distillery, and the ultimate fact presumed that he was carrying on the business of a distiller. The connection is arbitrary. The fact of a farmer walking on his own farm in an open field toward an unusual noise coming from a wooded area near the boundary of his farm is more rationally connected with the ultimate fact that he was lawfully investigating the activity to safeguard his property.

On the other hand, it is equally rational to draw an inference that a person approaching a distillery may do so as a prospective purchaser of the distilled product as pointed out in the case of United States v. Romano, 2nd. Cir., 330 F. 2d, 566, 570.

In the case of Wagoner v. United States, 4th. Cir., 346

In the case of Wagoner v. United States, 4th. Cir., 346 F. 2d 995 the Court was confronted with the factual question whether the defendant was shown to have been at the site or place where a still was set up. The Court held:

"At either end of the spectrum, there may be room for only one reasonable inference. The men actually working the still in the still yard cannot reasonably be said not to have been at the site or place where the still was. On the other hand, one a hundred yards away from a still such as this, armed with a book of verse and a pretty girl, could not reasonably be said to have been at the still site. In the middle of the spectrum, however, the factfinder must fulfill his function and choose between conflicting inferences, either one of which reasonable minds might embrace." (346 F. 2d. 995-996).

In the Wagoner case, supra, the defendant was in the still path carrying a glass fruit jar containing beer (mash). Apparently, the jar and contents were visible to the officers and no search was made prior to the arrest.

It is submitted that the evidence of lack of presence of Petitioner at the site of a still would preclude an instruction to the jury embodying the statutory presumption of presence. If the jury or factfinder could not base a verdict upon the statutory presumption in question, how can it be said that an officer may rely upon same as probable cause to justify a warrantless arrest for the offense of carrying on the business of a distiller?

The finding of probable cause to support a warrantless arrest and search based upon an inapplicable statutory presumption deprives Petitioner of his liberty without due process of law.

PRAYER

WHEREFORE, Petitioner prays that he may be granted a Writ of Certiorari and that this Honorable Court on hearing, the Judgment of the United States Court of Appeal, Fifth Circuit, affirming the Judgment and Sentence of the District Court of Georgia, be quashed, and Petitioner further prays for such other and further general relief as may be meet and proper.

Respectfully submitted,

TONEY AND GUARISCO
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Attorneys for Petitioner.

S. Gunter Toney

S. GUNTER TONEY

CERTIFICATE OF SERVICE

I do hereby certify that I served a copy of the foregoing Petition for Writ of Certiorari, by mail, to the Honorable Will Wilson, Assistant Attorney General, attention of Beatrice Rosenberg, Roger A. Pauley, Attorneys, U.S. Department of Justice, Washington, D.C. 20530, and Honorable William J. Schloth, 303 Federal Building, Mulberry and 3rd. Streets, Macon, Georgia, 31202, this 21st day of November, 1970.

S. Gunter Toney